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No. 96-1563

In The

Supreme Court of the United States

October Term, 1996

SC TESTING TECHNOLOGY, INC., *et al.*,

Petitioners,

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Maine Supreme Judicial Court

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents respectfully disagree with Petitioners' statement of the question presented. In Respondents' view, the actual questions presented in this case are the following:

(1) Whether under the Clean Air Act, once a State has enacted a statute as part of a conditionally approved revision to a State Implementation Plan, the State is thereafter precluded from repealing or amending the statute in question;

(2) Whether Petitioners, having failed to invoke the citizen suit provisions of the Clean Air Act, may seek to enforce the Clean Air Act in a breach of contract suit; and

(3) Whether the decision below rests upon adequate and independent state grounds in that the Maine Supreme Judicial Court ruled that Petitioners had contractually assumed the risk of loss and non-compensation in the event of statutory repeal, regardless of the consequences of such a repeal under the Clean Air Act.

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STATUTES AND OTHER PROVISIONS INVOLVED

42 U.S.C. § 7407(a):

> Each State shall have primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

42 U.S.C. § 7602(q):

> For purposes of this Act, the term "applicable implementation plan" means the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under [42 U.S.C. § 7410], . . . and which implements the relevant requirements of this Act.

42 U.S.C. § 7410(k)(4):

> The Administrator [of the EPA] may approve a plan revision based on a commitment of the State to adopt specific and enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

42 U.S.C. § 7410(h):

> Not later than 5 years after the date of enactment of the Clean Air Act Amendments of 1990 . . . , and every 3 years thereafter, the Administrator [of the EPA] shall assemble and publish a comprehensive document for each

> State setting forth all requirements of the applicable implementation plan for such State and shall publish notice in the Federal Register of the availability of such documents.

40 C.F.R. § 52.1022:

> . . . [T]he Administrator [of the EPA] approves Maine's plan, as identified in § 52.1020, for the attainment and maintenance of the national standards under section 110 of the Clean Air Act [42 U.S.C. § 7410].

40 C.F.R. § 52.1019 identifies the conditionally approved plan revision that contained the enhanced vehicle inspection/maintenance ("I/M") program that was the subject of Petitioners' contract.

40 C.F.R. § 52.1020 identifies Maine's applicable implementation plan.

42 U.S.C. § 7604(a), (b), and (c) provide in pertinent part:

> (a) Except as provided in subsection (b), any person may commence a civil action on his own behalf –
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment of the Constitution) who is alleged to have violated . . . or to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, . . .
>
> . . .
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the

citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties. . . . The district courts of the United States shall have jurisdiction to compel . . . agency action unreasonably delayed, . . .

(b) No action may be commenced –

(1) under subsection (a)(1) –

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, . . .

(c) . . .

(3) Whenever any action is brought under this section the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and on the Administrator. . . .

STATEMENT OF THE CASE

Respondents adopt by reference the statement of the case presented by the Supreme Judicial Court of Maine. Petition App. A-1 to A-5. Respondents specifically disagree with the following aspects of Petitioners' Statement.

Petitioners begin by asserting that "the State of Maine enacted Chapter 28 of Title 38, M.R.S.A. (the "MVEIP Law") in 1992 to comply with the requirements of the Clean Air Act", Petition at 4-5, citing as authority

for that proposition the opinion of the Maine Supreme Judicial Court. The phrasing of this statement suggests that the Maine Legislature was obligated by the Clean Air Act to enact the MVEIP law (or a law essentially identical to the MVEIP law), or at least that it regarded itself as having such an obligation. That theme recurs throughout the Petition. Petitioners go on to assert, for example, that events which occurred in 1994 and 1995 demonstrate that the Maine Legislature "knowingly violat[ed]" federal law when it repealed the MVEIP law. Petition at 9, 16. They even go so far as to allege that the Maine Supreme Judicial Court recognized the illegality of what the Legislature had done, but deliberately ignored it to "protect the State's fisc." Petition at 14. Respondents disagree both with the Petitioners' reading of the Supreme Judicial Court's opinion and with the inferences Petitioners would have this Court draw from the record.

First, the Supreme Judicial Court did not say that the MVEIP law was enacted to comply with the Clean Air Act. What it said was that the MVEIP law was "part of a plan to comply with the federal Clean Air Act." The distinction is important. As discussed in more detail below, the State was required to have a "plan," but neither any provision of the Clean Air Act nor any edict of the Environmental Protection Agency required that the plan include an emissions testing program of the kind or scope established under the MVEIP law and the MVEIP contract. Second, while the Attorney General did advise the Maine Legislature that repeal or suspension of the emissions inspection program might subject the State of Maine to federal sanctions of one sort or another, R. II, 467, there is no suggestion in his opinion that a repeal of

the MVEIP law would be invalid, or that the EPA could require the State to keep the program in force.

Petitioners next characterize Section 2404 of the MVEIP law as having "required the Maine Department of Environmental Protection ("MDEP") and the State to privatize the program through a contract with a private entity with a term of not less than five years." Petition at 5. That characterization suggests that the Maine Legislature statutorily committed the State of Maine to have an emissions inspection program in force for at least five years, and that termination of the program within five years would violate that commitment. In the decision below, however, the Maine Supreme Judicial Court held squarely to the contrary. The Court interpreted the statute as meaning simply that "any contractor selected by the DEP to administer the program would have to agree to do so for a minimum period of time sufficient to ensure program continuity," and further held that the five-year provision "in no way guaranteed, nor could it, that the legislation authorizing the program would not be repealed by a subsequent legislature." App. A-9. The state court's interpretation of that state statute is unassailable in the Supreme Court, and it directly refutes Petitioners' characterization of Section 2404.

Petitioners omit from their Statement of the Case much of the factual background of the contract in issue, and any analysis of the Maine courts' interpretation of the contract. The factual background is accurately summarized in the body of the Maine Supreme Judicial Court decision. Petition App. A-1 to A-5. The legal basis for the Supreme Judicial Court's conclusion that Petitioners' contract claim failed was twofold. First, the Court held that

the written contract incorporated the Amended Request for Proposals, and therefore unambiguously "allocated to SCI [Petitioners] the risk of legislative repeal of the program." Petition App. A-7. The Court reasoned further, as an alternative ground for decision, that as a matter of state common law "when a party enters into a contract with a state agency, it does so with the understanding that the Legislature may at some future time take action that nullifies the subject matter of the contract and, necessarily, the respective performance obligations of the parties." *Id.*[1]

Finally, a word about the procedural progress and posture of the case is in order. As noted by Petitioners, the Complaint they filed in the state court asserted that the repeal of the MVEIP law was "contrary to the requirements of the federal Clean Air Act Amendments of 1990, [and] constituted a violation of federal law." R.I., 15. In several counts of their Complaint, Petitioners asked that the State be "mandatorily enjoin[ed] . . . to reinstate the MVEIP law and the MVEIP program." R.I., 20, 21, 22, 23, 25. *See also* R.I. 25, 26 (asking that the repeal be declared unconstitutional and that individual Defendants be

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[1] Petitioners assert that the Supreme Judicial Court based its decision in part on "state . . . procurement law." Petition at 9, 15. In the proceedings below, the term "state procurement law" was used to describe the statutory and regulatory framework governing the process by which a contract between an agency of the State of Maine and a private entity is put to bid, and the extent to which the terms of such a contract may deviate from the terms of a request for proposals. Brief of Appellants at 31-33. The Supreme Judicial Court did not address any issues of "state procurement law," as so defined.

ordered to "implement the MVEIP program"). That prayer for relief is conspicuously absent, however, from the counts of the Complaint seeking damages for breach of contract. R.I. 17, 19. The trial court judge observed in his Opinion and Order that Petitioners had indicated in briefing and in oral argument that the option of seeking an order reinstating the MVEIP program was "not being seriously pursued." Petition App. C-8. And in their submissions to the Maine Supreme Judicial Court, Petitioners conceded that their suit was "not brought as a 'citizens suit' under § 7604 of the Clean Air Act." Reply Brief of Appellants at 31. Thus, it appears that Petitioners have abandoned any effort to "reinstate" the MVEIP law or the MVEIP program, or to otherwise enforce an obligation on the part of the State of Maine to "comply" with federal law.

REASONS FOR DENYING THE WRIT

There are at least four reasons for denying the writ of certiorari. Initially, this appears to be a case of first impression, and there is no reason to suppose that the circumstances that gave rise to this lawsuit are likely to recur in Maine or anywhere else. The question presented, therefore, does not go "beyond the academic or the episodic," and does not merit review in this Court. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955).

Second, the Maine Supreme Judicial Court correctly decided this case as a matter of contract interpretation under Maine law. It did not reach the question of "federal

preemption" raised by the Petitioners, because determination of the question either for or against the Petitioners would not have altered the court's construction of the unambiguous contract terms.

Third, Petitioners abandoned their initial prayer for relief in the form of an order reinstating the MVEIP law, Maine's emissions testing program, or the parties' performances under the contract. Since they are not seeking to force the State of Maine to comply with federal law, they lack procedural standing to assert any claim predicated on the Clean Air Act or the regulations promulgated thereunder.

Fourth, and finally, Petitioners' substantive contention that the Maine Legislature's repeal of the MVEIP law was preempted by federal law or regulation is incorrect. The EPA's "conditional approval" of a Maine state implementation plan revision ("SIP"), which proposed the program in a submission to the EPA as part of the joint federal/state implementation of particular Clean Air Act requirements, did not preclude subsequent action by the Maine Legislature to revise the State's method of implementation of Clean Air Act requirements.

I. THE DECISION BELOW CONFLICTS WITH NO FEDERAL AUTHORITY, AND ITS CORRECTNESS PRESENTS NO QUESTION OF SUFFICIENT IMPORTANCE TO JUSTIFY REVIEW BY CERTIORARI.

Petitioners have asserted that the decision of the Maine Supreme Judicial Court "squarely conflicts with decisions of this Court and Federal Courts of Appeals."

Petition at 10. They have, however, cited no federal appellate decision addressing the precise issue they would have this Court take up, and in fact no such decision exists. Specifically, no federal appellate court – and apparently no court at any level – has held that a state is prohibited from repealing a statute incorporated in a conditionally-approved State Implementation Plan ("SIP").

Furthermore, the question of preemption, as framed by Petitioners, is not of sufficient importance to justify this Court's exercise of its certiorari power. The very fact that the issue has not arisen before suggests that it does not go beyond "the academic or the episodic." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955). While the issue may be "important" to the Petitioners, they have not shown that it is important to the public at large. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). Respondents respectfully submit that this Court ought not squander its resources reviewing an issue of marginal importance, particularly in light of the substantive flaws in the argument presented in support of the Petition.

II. REPEAL OF THE MVEIP LAW DID NOT CONFLICT WITH FEDERAL LAW OR EPA REGULATIONS.

A. The Federal-State Partnership Established By The Clean Air Act Allocates To The State Of Maine The Responsibility For Deciding How Best To Achieve The Act's Objectives.

Petitioners impute to the 117th Maine Legislature, which repealed the law authorizing the particular vehicle I/M program created under the MVEIP contract, a corporate intent to "knowingly" violate the Clean Air Act. Noticeably absent from Petitioners' preemption argument, however, is any citation or reference to a federal regulation or statute that expressly required the State of Maine to implement an I/M program of the kind or scope contemplated by the contract. In fact, neither federal law nor EPA regulation mandates that the State of Maine implement the precise enhanced vehicle I/M program in issue, and the EPA does not impose a specific program on any given state. *See Commonwealth of Virginia v. EPA*, 108 F.3d 1397, 1406-09 (D.C. Cir. 1997).

The Clean Air Act contains express language reflecting an intent *not* to preempt state action regulating air quality, and allocating to the states primary responsibility for choosing the methods for achieving and maintaining national air quality standards:

> Each State shall have primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards

> will be achieved and maintained within each air quality control region in such State.

42 U.S.C. § 7407(a). *See Train v. Natural Resources Defense Council*, 421 U.S. 60, 79 (1975).

This section, and Sections 7401-7515 of the Act generally, establish "a federal-state partnership for the control of air pollution." *National Resources Defense Council, Inc. v. Browner*, 57 F.3d 1122, 1123 (D.C. Cir. 1995); *Coalition for Clean Air v. United States Environmental Protection Agency*, 971 F.2d 219, 226 (9th Cir. 1992); *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1036-37 (7th Cir. 1984).

> The state proposes, the EPA disposes. The federal government through the EPA determines the ends – the standards of air quality – but Congress has given the states the initiative and a broad responsibility regarding those means to achieve those ends . . . The Clean Air Act is an experiment in federalism, and the EPA may not run roughshod over the procedural prerogatives that the Act has reserved to the states, . . . especially when, as in this case, the agency is overriding state policy.

Commonwealth of Virginia, 108 F.3d at 1408 (quoting *Bethlehem Steel Corp.*, 742 F.2d at 1036-37).

In short, the EPA's exercise of "approval" power under 42 U.S.C. § 7410 does not permit the agency "to require the state to pass legislation or issue regulations containing control measures of EPA's choosing." *Id.* (citing *EPA v. Brown*, 431 U.S. 99, 103 (1977) (per curiam)). Petitioners' preemption argument challenges this settled principle by suggesting that an EPA regulation "conditionally approving" a state program under § 7410(k)(4)

binds the state to that chosen course, requiring the state to enact and maintain state law mandating the particular program. But, since EPA could not have required the State of Maine to enact a law like the MVEIP law in the first instance, it makes no sense to say that its conditional approval of a plan incorporating that law gave the agency the power to prohibit the law's repeal.

The Maine Legislature, having evaluated political and public policy concerns unique to the State of Maine, made a considered decision to enact the MVEIP law as part of the State's plan to meet national ambient air quality standards. The Legislature subsequently chose to abandon the enhanced I/M program as an element of its plan. In making both decisions, the State of Maine was fulfilling the precise role allocated to it under the Clean Air Act, to be "primarily responsible" for deciding what means to use to assure air quality "within the entire geographic area" comprising the state, [42 U.S.C. § 7407(a)], and to adopt "whatever mix of emission limitations it deems best suited to its particular situation." *Commonwealth of Virginia*, 108 F.3d at 1408 (quoting *Train*, 421 U.S. at 79).

B. EPA's Conditional Approval Of An Implementation Plan Including The MVEIP Law Did Not Preclude The Maine Legislature From Repealing That Law.

In apparent recognition that there is no federal requirement that Maine implement the enhanced I/M program that was the subject of the MVEIP contract, Petitioners suggest that the EPA's prior conditional

approval, on November 3, 1994, of the SIP revision proposing the I/M program was nevertheless still in effect to require the program as an "applicable" part of the state implementation plan. The critical premise of the argument – never directly addressed in the pending petition – is that a "conditionally approved" revision to an SIP becomes "binding" on the state if the state chooses not to continue its implementation. Petitioners' theory that conditional approval of the I/M program revision to Maine's SIP became an "emissions standard or limitation in effect under an applicable implementation plan" is fundamentally incorrect.

Of critical significance is the Clean Air Act's definition of "applicable implementation plan":

> For purposes of this Act, the term "applicable implementation plan" means the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under [42 U.S.C. § 7410], . . . and which implements the relevant requirements of this Act.

42 U.S.C. § 7602(q). To understand the basic flaw in Petitioners' argument, it is essential to appreciate the difference, under the current version of the Clean Air Act, between "approval" of a State Implementation Plan and "conditional approval" of proposed plan revisions.

As part of the comprehensive 1990 amendments to the Clean Air Act, Congress revised the section of the Act outlining requirements for EPA action on SIP submissions, including timetables and the types of action EPA is authorized to take on each SIP revision. 42 U.S.C. § 7410(k); *see also, H.R. Rep. No. 490 (I) 101st Cong., 2nd*

Sess. Section 7410(k)(4) of the Act specifically prescribes the consequences of "conditional approval":

> The Administrator [of the EPA] may approve a plan revision based on a commitment of the State to adopt specific and enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. *Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.*

42 U.S.C. § 7410(k)(4) (emphasis added). The concepts of "full" and "partial" approval and "disapproval" are also defined in Section 7410(k)(3) ("If a portion of the plan revision meets all the applicable requirements of this Act, the Administrator may approve the plan revision in part and disapprove the plan revision in part"). The new section thus draws a distinction between "partial approval" and "conditional approval." That distinction is critical, because only "approved" plan provisions are enforceable against the state, either by sanctions levied against the state by the EPA under Section 7410(m) or by means of a Section 7604 citizens suit seeking the same enforcement result.[2] The legal effect of "conditional

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[2] The EPA's power to commence sanctions upon a finding of "disapproval" is governed by 42 U.S.C. § 7509(a). Generally, if the EPA finds that a state has failed to make any required plan submission to the EPA, or if the EPA "disapproves in whole or in part a submission" or finds that any requirement of an approved plan is not being implemented, the state is given eighteen months to correct the deficiency after notice, and failure thereafter triggers various sanctions enumerated in the statute. 42 U.S.C. § 7509(a)-(b). The EPA is also authorized to "promulgate a federal implementation plan at any time within

approval" is, therefore, of critical significance to whether or not "conditionally approved" portions of a plan submission become "binding" on a state. Under the 1990 amendments to the Clean Air Act, adding Section 7410(k)(4), the intent of the "conditional approval" definition was to ensure that a conditionally approved portion of a plan does *not* become binding on the state as an "approved" portion if the plan is not carried out; to the contrary, Section 7410(k)(4) unambiguously requires that "any such conditional approval shall be treated as *disapproval*" if the state fails to carry out the plan provision. 42 U.S.C. § 7410(k)(4) (emphasis added).

Repeal of the MVEIP law became effective within one year of the EPA's November 3, 1994 conditional approval of the subject I/M program plan revision, thereby triggering, for purposes of preemption analysis, the effective *disapproval* of the I/M program submission, under the last sentence of 42 U.S.C. § 7410(k)(4). The State of Maine enhanced I/M program submission to the EPA is not part of the "applicable implementation plan" for the purposes of the Clean Air Act.[3]

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two years after the EPA finds that a state has failed to make a required plan submission" or after the EPA has disapproved a state implementation plan submission "in whole or in part." 42 U.S.C. § 7410(c). If the state corrects the deficiency and effects the approval of a plan revision before the Administrator promulgates the federal implementation plan, then the federal implementation plan does not go into effect. *Id.*

[3] In the body of the Petition, the Calcagni Memorandum is mentioned again by Petitioners. The content of the Memorandum was raised for the first time below in Petitioners' *Reply Brief of Appellants* submitted to the Maine Supreme Judicial Court and included in the back of the brief as a form of

Lest there be any question that the EPA's conditional approval of this specific I/M program never became part of Maine's applicable, approved SIP, the EPA has listed explicitly, by regulation, all the parts of Maine's approved plan. That designation was made pursuant to Section 7410(h) of the 1990 Amendments to the Clean Air Act, which requires the EPA to publish in the Federal Register all the discrete plan provisions that have received actual approval over the years in order to more readily identify the overall "applicable implementation plan" for each state. 42 U.S.C. § 7410(h). The federal "identification" of Maine's SIP appears at 40 C.F.R. § 52.1020. *See also* 40 C.F.R. § 52.1022 ("the Administrator [of the EPA] approves Maine's plan, *as identified in § 52.1020,* for the attainment and maintenance of the national standards under section 110 of the Clean Air Act [42 U.S.C. § 7410]."") (emphasis added). None of the plan revisions

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"addendum." There is no Maine procedural rule directly on point governing the submission of "evidence" in this fashion. The Memorandum was never made a part of the evidentiary record before the court. The EPA's official interpretations of any provisions of the Clean Air Act were not made a part of the record below. The EPA did not move to intervene in the state proceedings. In any event, Calcagni emphasizes in the more pertinent portion of the Memorandum: "There are *at least* two ways that the conditional approval may be converted to a disapproval. First, if the State fails to adopt and submit the specified measures by the end of one year . . . " Memorandum from John Calcagni, Director, Air Quality Management Division, EPA, to Regional Air Program Directors, "Processing of State Implementation Plan (SIP) Submittals," July 7, 1992, at 6-7 (emphasis added). This view would appear to recognize the "disapproval" triggered by a state's failure or refusal to carry out conditionally approved SIP revisions.

pertaining to an enhanced vehicle I/M program in the State of Maine are identified as part of the approved state SIP. Thus, the regulations make it clear that the EPA does not regard the conditionally-approved I/M plan revisions as part of Maine's approved "applicable implementation plan."

In summary, Petitioners' preemption argument is both inconsistent with the Act's overall structure and remedial scheme, and unsupported by any provisions of the Act. Federal law did not and does not require the State of Maine to have an enhanced I/M program like the one authorized by the MVEIP law and created by Petitioners' contract with MDEP. Thus, Petitioners' claim that the repeal of the MVEIP law violates the Clean Air Act, and that it is invalid under the Supremacy Clause is without merit.

III. PETITIONERS PROCEDURALLY LACKED STANDING TO CHALLENGE THE REPEAL OF THE MVEIP LAW IN THIS ACTION.

Even if there were any legal basis for Petitioners' preemption argument, this lawsuit is not an appropriate vehicle for its assertion. The parties agree that the present case was not brought as a "citizen suit" under Section 7604 of the Clean Air Act, and that Petitioners never intended that the case be treated as such. Yet the citizen suit procedures of Section 7604 are the exclusive means by which Petitioners would be able to assert a claim that the emissions inspection laws, once enacted in the State of Maine, are still enforceable against the Maine DEP and Bureau of Motor Vehicles.

The citizen suit provision of the Clean Air Act provides an enforcement mechanism by which any interested person can sue the state for failing to comply with an approved SIP [state implementation plan] or FIP [federal implementation plan standing in the place of deficient portions of an SIP] that is in effect under the Clean Air Act. Section 7604 vests jurisdiction of such suits in the federal district courts. 42 U.S.C. § 7604(a). The district courts are authorized to enforce provisions of an approved SIP or FIP which is in effect under the Act, or to order the Administrator of the EPA to "perform such act or duty, as the case may be." 42 U.S.C. § 7604(a).

The conclusion that Section 7604 provides the exclusive vehicle for Petitioners' challenge to the repeal of the MVEIP law is dictated both by the text of the Clean Air Act and by an analysis of its enforcement scheme. From the standpoint of textual analysis, the exclusivity of Section 7604 as a vehicle for Petitioners' attack on Maine law is apparent from an analysis of what Petitioners call their "savings clause," subsection (e). That subsection provides:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator [of the EPA] or a state agency).

42 U.S.C. § 7604(e) (emphasis added). This subsection makes it clear that section 7604 could not be asserted as the basis to procedurally bar Petitioners' claim against the state agency for "other relief." However, Petitioners asserted no other "statute or common law" basis which

otherwise entitled them to "seek enforcement of" the MVEIP law or to obtain "other relief" authorized or made available by the Clean Air Act. Petitioners simply sought to enforce the MVEIP law, if at all, on the theory that it is still an "emission standard or limitation under [the Clean Air] Act," 42 U.S.C. § 7604(a)(1), thus bringing their claim squarely within the citizens suit provisions of Section 7604.

The overall structure of the Clean Air Act, particularly its enforcement scheme, further belies Petitioners' position that they ought to have been able to challenge in this suit the repeal of the MVEIP law. One key aspect of the citizens suit provision is that in any action brought by a person against a state or state agency, the EPA is given notice of the suit, and the right to intervene. 42 U.S.C. § 7604(b), (c)(1)(3) ("plaintiff shall serve a copy of the complaint on the Attorney General of the United States and on the Administrator [of the EPA]"). The EPA is included in suits seeking enforcement of approved SIPs because the key to enforcement, where a state has failed to implement an approved SIP provision, is the EPA's power to sanction the state. *See* 42 U.S.C. § 7509(a)-(d). Thus, even if Maine's MVEIP law had not been effectively repealed because termination of the emissions testing program amounted to a violation of the "approved" SIP, and thus of federal law, the only effect of the Clean Air Act would be to empower EPA to impose sanctions as the result of the State's failure to implement the law. In short, whether the MVEIP law is required by the Clean Air Act or not has no bearing on the outcome of this case, especially under circumstances where Petitioners have abandoned any effort to obtain an order mandating

enforcement of the MVEIP law or reinstatement of the parties' performances under the contract.

IV. INDEPENDENT AND ADEQUATE STATE GROUNDS SUPPORT THE JUDGMENT OF THE MAINE SUPREME JUDICIAL COURT

The essence of the holding of the Maine Supreme Judicial Court below was that by the express terms of the contract between Systems Control and MDEP, Systems Control bore completely "the risk of legislative repeal of the [emissions inspection] program." App. A-7. The principal basis for that holding was that the final contract between the parties incorporated by reference the following provision of the Amended Request for Proposals:

> Note: In the event the Maine Legislature repeals all or part of the program, the Department and the State of Maine shall bear no responsibility to compensate the Contractor.

App. A-3. The Supreme Judicial Court further reasoned that an interpretation of the contract as incorporating (by virtue of its "conflicts" provision) this "risk-of-repeal note"

> gives effect to the unambiguous intention of the parties, as shown both by the language of the conflicts clause and the circumstances surrounding their agreement, that SCI [Petitioners] would bear the risk of loss in the event the Legislature repealed the program.

App. A-7.

The Supreme Judicial Court did not analyze, nor even address, Petitioners' contention that the Maine Legislature was prohibited by federal law from repealing the emissions inspection law. In its Petition for Certiorari, Systems Control characterizes the Supreme Judicial Court's treatment of that issue differently in different places. At one point, Petitioners accuse the Supreme Judicial Court of having simply dodged the issue "to protect the State's fisc." Petition at 14. At another, Petitioners suggest that the Court may have considered preemption but decided, *sub silentio*, that its preemption theory was either substantively flawed or procedurally unavailable. Petition at 10. There is, however, a third distinct possibility: The Court may simply have concluded that in light of its interpretation of the contract, preemption was irrelevant.

There is nothing in the contract, as construed by the Supreme Judicial Court, which would suggest that MDEP intended to disavow only liability for damages flowing from a repeal that was consistent with federal law, and that the agency or the State of Maine intended to bear any loss flowing from a repeal ultimately held illegal under the Clean Air Act. The "risk-of-repeal note" is unequivocal and unambiguous, disavowing *all* "responsibility to compensate the Contractor" in the event of any repeal. The Supreme Judicial Court found, moreover, that this provision was consistent with the parties' "unambiguous intention" that MDEP and the State should bear no risk of loss whatsoever in connection with the repeal. App. A-7.

Wherever it appears that the decision of a state court "might" have rested on an independent and adequate nonfederal ground, the Supreme Court lacks jurisdiction

to review it. *Ellis v. Dixon*, 349 U.S. 458, 459 (1955); *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952). Thus, this Court has declined to undertake review of state court decisions when it has not affirmatively appeared from the record that a decision on a federal question was necessary to the determination of the case. *Durley v. Mayo*, 351 U.S. 277, 281 (1956). *See Black v. Cutter Laboratories*, 351 U.S. 292, 299-300 (1956). Here, it is apparent that the Supreme Judicial Court's decision not only might have, but almost certainly did, rest on an interpretation of the MVEIP contract under which MDEP and the State of Maine would be relieved of any obligation to compensate Petitioners irrespective of the validity of the repeal. Thus, preemption was irrelevant to the decision below, and even acceptance by this Court of Petitioners' preemption argument would not change the result in the state courts. Accordingly, the Petition should not be granted.

CONCLUSION

This case does not present any of the important policy issues or federal questions raised in the petition. Because the Petitioners here expressly and unambiguously agreed to assume the whole risk of loss and non-compensation in the event of subsequent legislative action nullifying the parties' obligations under the contract, they are in no position to claim harm by later raising issues of whether repeal of authorizing legislation is valid under principles of federal supremacy. At an even more fundamental level, their position that federal regulation preempted the repeal is incorrect, and does not raise a substantial question of Clean Air Act preclusion of

state legislation. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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